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FIMBANK PLC v. PEMILIK DAN/ATAU PENCARTER DEMIS KAPAL ATAU VESEL "NIKA" KINI DIKENALI SEBAGAI "BAO LAI"

FEDERAL COURT, PUTRAJAYA
NALLINI PATHMANATHAN FCJ
B MARY LIM FCJ
RHODZARIAH BUJANG FCJ
[CIVIL APPEAL NO: 02(i)-31-04-2023(W)]
16 OCTOBER 2023

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Abstract – *The renewal of a writ is governed by O. 6 r. 7 of the Rules of Court 2012; more particularly, O. 6 r. 7 expressly provides that the validity of a writ in an admiralty action may be extended five times where efforts to serve the writ on a defendant have been unsuccessful. An admiralty writ in rem can only be served on the vessel itself if the vessel comes into Malaysian waters. Hence, in view of the claimant having exhausted the five-time extension of the validity of the writ, and the vessel seeming to be evading service by not coming into jurisdiction and changing its ownership, the court exercised its inherent jurisdiction to extend the admiralty writ in rem for as long as vessel does not enter the jurisdiction.*

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CIVIL PROCEDURE: *Service – Writ in rem – Service to be effected on vessel once it enters jurisdiction – Vessel did not enter Malaysian waters – Court allowed extension of validity of writ for five times – Application to further extend validity of writ – Whether admiralty writ in rem to be contrasted from ordinary civil writ – Whether five-time limit renewal applies to admiralty writs – Whether court ought to allow renewal of writ for as long as vessel does not enter jurisdiction – Whether denial to extend validity of writ would result in manifest injustice – Rules of Court 2012, O. 6 rr. 7(2), 7(2A), O. 70, O. 92 r. 4*

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G The appellant, Fimbank Plc ('Fimbank') was a Maltese bank and a trade financier, who had financed the purchase of a cargo ('cargo') by its borrower-customers. In exchange, Fimbank obtained the original bills of lading to the cargo as security for the financing extended. The cargo was shipped on board the vessel 'NIKA' ('vessel') for carriage from Chornomorsk, Ukraine to an Egyptian Mediterranean Port. At the material time, the vessel was owned by the respondent ('vessel owners'). On 17 May 2019, Fimbank filed an admiralty writ *in rem* in the High Court at Kuala Lumpur ('writ') against the vessel owners on the grounds that the vessel owners misdelivered the cargo to unauthorised third parties without presentation of the original bills of lading, thereby causing loss to Fimbank. This cause of action was well-established in this jurisdiction. The writ was required to be physically served

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on the vessel within Malaysian waters on or before 16 November 2019. However, Fimbank was unable to do so as the vessel had not entered Malaysian waters since the writ was issued. Therefore, Fimbank applied to the court to extend the validity of the writ pursuant to O. 6 r. 7(2) and O. 6 r. 7(2A) of the Rules of Court 2012 ('ROC'). Between 15 November 2019 and 10 November 2021, Fimbank made a total of five applications to renew the writ on the grounds that the vessel had not been in Malaysian waters for service of the writ to be effected. The High Court allowed all five applications and accordingly extended the validity of the writ five times consecutively for a period of six months each time. The fifth extension granted by the High Court extended the validity of the writ until 16 May 2022. On 13 April 2022, Fimbank filed an application to extend the validity of the writ for the sixth time premised on the reason that the writ remained unserved due to the vessel not having entered Malaysian waters since the issuance of the writ. This assertion was made based on Fimbank's consistent monitoring of the movements of the vessel. Fimbank further highlighted that the ownership of the vessel had changed three times since the cause of action arose, as a result of which Fimbank could not issue a fresh writ *in rem* for the same claim. This was because Fimbank's claim *in rem* fell under a category of maritime claims known as a statutory right of action *in rem* or 'statutory lien'. Such a claim required Fimbank to establish liability *in personam* on the part of the owner of the defendant vessel at the time the writ *in rem* was issued. However, the present owner of the vessel, Bao Yi, was not the party liable for Fimbank's claim *in personam*. In other words, the change in ownership of the vessel had the effect of defeating any fresh claim *in rem* brought by Fimbank against the vessel owners. In any event, the limitation period for Fimbank's claim had expired. Fimbank thus argued that its substantive rights against the vessel owners were now vested in and contingent on the writ as issued on 17 May 2019 and that if the writ was not renewed, it would be deprived of its substantive rights through no fault of its own, amounting to manifest injustice. Fimbank thus urged the High Court to use its inherent powers, under O. 92 r. 4 of the ROC, to renew the writ beyond the fifth time. The High Court dismissed Fimbank's application. Fimbank's appeal to the Court of Appeal was dismissed wherein the Court of Appeal affirmed the findings of the High Court. Fimbank was granted leave to appeal to the Federal Court on the following questions of law: (i) whether O. 6 r. 7(2) of the ROC places an absolute cap and/or limit upon the number of times an admiralty writ *in rem* may be extended and/or renewed; (ii) whether O. 6 r. 7(2) applies in circumstances where personal service of an admiralty writ *in rem* is an impossibility; (iii) whether O. 6 r. 7(2) is intended to abrogate or defeat a claimant's accrued statutory rights to prosecute its claim *in rem* and to security for its claim; and (iv) whether the language of O. 6 r. 7(2) precludes the court from exercising its inherent jurisdiction to extend the validity of an admiralty writ *in rem* when the court is of the view that the justice of the case requires it.

A B C D E F G H I

Held (allowing appeal with costs in cause):
Per Nallini Pathmanathan FCJ delivering the judgment of the court:

(1) Order 70 of the ROC is the primary provision under the ROC that governs admiralty causes and matters. An admiralty writ *in rem* ought to be contrasted from an ordinary civil writ. Where a defendant is evading service or cannot be traced, O. 62 r. 5 of the ROC allows the writ to be served by way of substituted service. If the defendant is not within the jurisdiction, O. 11 of the ROC permits the plaintiff to apply for service of the writ out of the jurisdiction in order to bring the defendant within the court's jurisdiction. These provisions, however, do not apply to an admiralty writ *in rem*, which is required under O. 70 of the ROC to be served through single means, that is, personally on the defendant vessel if and when it enters Malaysian waters. If the vessel does not enter the jurisdiction, the service of the writ could not be effected. (paras 21, 23 & 26)

(2) The purpose and object of O. 6 r. 7(2) of the ROC, which is to ensure the prompt service of a writ on a defendant, does not cater for, and is therefore inapplicable to, situations where it is impossible for a plaintiff to effect personal service of an admiralty writ *in rem*. Where the defendant vessel never comes into the jurisdiction, the five-time limit on the number of renewals of an admiralty writ does not apply. A harmonious reading of O. 6 r. 7(2) and O. 70 of the ROC gives rise to an approach that is consistent with the position of law in other leading maritime jurisdictions, such as Singapore, England, Hong Kong and Australia. Since an admiralty writ *in rem* can only be served on the defendant vessel within the territorial jurisdiction of the court, it necessarily follows that the court ought to allow the writ to be renewed for as long as the defendant vessel does not enter the jurisdiction. (paras 27, 28 & 35)

(3) Fimbank had, through the commencement of its claim *in rem*, acquired a statutory right of action *in rem* to proceed against the vessel. Although the ownership of the vessel had changed three times since the issuance of the writ, Fimbank's statutory right of action *in rem* persists. Order 6 r. 7(2) could not be utilised to defeat this right. Nor could it be used to deny a claim that has been brought within time where there is no factual or legal basis to do so. Fimbank had not slept on the writ, nor had it forsaken any steps to effect service of the same. In fact, it has diligently monitored the movements of the vessel throughout the period of validity of the writ. Fimbank could not be faulted for the non-arrival of the vessel into Malaysian waters, rendering service of the writ an impossibility. The changes in ownership of the vessel after the writ's issuance were similarly beyond Fimbank's control. Manifest injustice would result to Fimbank in the event that its statutory right to prosecute

its claim *in rem* and to obtain security for its claim were defeated by reason of a pedantic reading of O. 6 r. 7(2) of the ROC. (paras 36, 37, 39 & 40)

(4) The absence of a *lacuna* in the ROC cannot of itself fetter the exercise of the court's inherent powers. Further, the reasoning of the courts below that there was no *lacuna* in the ROC was flawed and incorrect because the lack of a *lacuna* necessarily indicated the availability of alternative remedies to an aggrieved litigant. No such alternative remedy was available to Fimbank. The construction accorded to O. 6 r. 7(2) by the courts below ignored the practical difficulties faced by plaintiffs in effecting service of a writ *in rem* where the defendant vessel never came into the jurisdiction. It also potentially incentivised owners of a vessel to evade liability by keeping their vessel out of the jurisdiction until the limitation period for the claim expired. Therefore, O. 6 r. 7(2) of the ROC could not be construed so as to impose an absolute cap or limit on the number of times an admiralty writ *in rem* could be renewed. The ultimate discretion to decide whether to allow the renewal of a writ *in rem* in the interests of justice rests with the court. (paras 44 & 50)

Obiter:

(1) The Rules Committee in 2000 introduced an amendment to O. 6 r. 7(2) of the Rules of the High Court 1980 by limiting the number of times a writ can be renewed to twice for ordinary writs in Peninsular Malaysia, thrice for ordinary writs in Sabah and Sarawak and five times for admiralty writs. This provision is in *pari materia* with O. 6 r. 7(2) of the ROC. The Rules Committee ought to consider amending O. 6 r. 7(2) of the ROC to remove the five-time limit on the number of renewals of an admiralty writ. Such an amendment would inevitably prevent unjust situations such as the one that arose in the instant appeal and also be in keeping with the laws of other major maritime jurisdictions. (paras 49 & 51)

Bahasa Melayu *Headnotes*

Perayu, Fimbank Plc ('Fimbank'), sebuah bank Malta dan pembiaya perniagaan, telah membiaya belian kargo ('kargo') oleh peminjam pelanggannya. Sebagai ganti, Fimbank memperoleh bil muatan asal untuk kargo tersebut sebagai jaminan biayaan tersebut. Kargo tersebut dihantar melalui kapal 'NIKA' ('kapal') untuk dihantar dari Chornomorsk, Ukraine ke Pelabuhan Mediterranean Mesir. Pada masa itu, kapal tersebut dimiliki oleh responden ('pemilik kapal'). Pada 17 May 2019, Fimbank memfailkan writ admiralti *in rem* di Mahkamah Tinggi di Kuala Lumpur ('writ') terhadap pemilik-pemilik kapal atas alasan bahawa pemilik-pemilik kapal tersalah

A hantar kargo kepada pihak ketiga yang tiada hak tanpa mengemukakan bil muatan asal lantas mengakibatkan kerugian pada Fimbank. Kausa tindakan ini dibuktikan adalah dalam bidang kuasa ini. Writ tersebut diperlukan untuk diserahkan secara kediri atas kapal dalam perairan Malaysia pada atau sebelum 16 November 2019. Walau bagaimanapun, Fimbank tidak boleh
B berbuat demikian kerana kapal tersebut tidak memasuki perairan Malaysia semenjak writ itu dikeluarkan. Oleh itu, Fimbank memohon ke mahkamah untuk lanjutan kesahan writ tersebut menurut A. 6 k. 7(2) dan A. 6 k. 7(2A) Kaedah-kaedah Mahkamah 2012 ('KKM'). Antara 15 November 2019 dan 10 November 2021, Fimbank membuat lima permohonan untuk
C membaharui writ atas alasan kapal tersebut tiada dalam perairan Malaysia untuk penyerahan writ. Mahkamah Tinggi membenarkan kelima-lima permohonan tersebut dan berikutan itu, melanjutkan kesahan writ lima kali berturut-turut untuk tempoh masa enam bulan setiap kali. Lanjutan kelima yang diberi Mahkamah Tinggi melanjutkan kesahan writ tersebut sehingga 16 Mei 2022. Pada 13 April 2022, Fimbank memfailkan permohonan lanjutan
D kesahan writ untuk kali keenam atas alasan writ tersebut masih belum diserahkan kerana kapal itu tidak memasuki perairan Malaysia semenjak pengeluaran writ. Pernyataan ini dibuat berdasarkan pemantauan secara konsisten terhadap pergerakan kapal tersebut. Fimbank selanjutnya menekankan bahawa milikan kapal tersebut telah bertukar sebanyak tiga kali
E semenjak kausa tindakan ini timbul, dengan itu, Fimbank tidak boleh mengeluarkan writ *in rem* yang baru untuk tuntutan yang sama. Ini kerana tuntutan Fimbank *in rem* terangkum dalam kategori tuntutan maritim yang dikenali sebagai hak tindakan statutori *in rem* atau 'statutory lien'. Tuntutan sedemikian memerlukan Fimbank membuktikan liabiliti *in personam* pada
F pihak pemilik kapal defendan pada masa writ *in rem* dikeluarkan. Walau bagaimanapun, pemilik semasa kapal itu, Bao Yi, bukan pihak yang bertanggungan terhadap tuntutan *in personam* Fimbank. Dalam kata lain, pertukaran milikan kapal mempunyai kesan menafikan apa-apa tuntutan baru *in rem* yang dibawa oleh Fimbank terhadap pemilik-pemilik kapal. Walau
G apa pun, tempoh had masa untuk tuntutan Fimbank telah luput. Fimbank, oleh itu, menghujahkan bahawa hak substantifnya terhadap pemilik-pemilik kapal kini terletak hak dan bergantung pada writ yang dikeluarkan pada 17 Mei 2019 dan jika writ itu tidak dibaharui, Fimbank akan dinafikan hak substantifnya yang bukan salahnya sendiri, menjurus pada ketidakadilan
H nyata. Oleh itu, Fimbank menggesa Mahkamah Tinggi menggunakan kuasa sedia ada bawah A. 92 k. 4 KKM untuk membaharui writ itu melebihi lima kali. Mahkamah Tinggi menolak permohonan Fimbank. Rayuan Fimbank ke Mahkamah Rayuan ditolak dan Mahkamah Rayuan mengesahkan dapatan Mahkamah Tinggi. Fimbank diberikan kebenaran merayu ke Mahkamah Persekutuan atas soalan-soalan undang-undang berikut: (i) sama ada A. 6
I k. 7(2) KKM meletakkan batasan mutlak dan/atau had berapa kali writ

admiralti *in rem* boleh dilanjutkan dan/atau dibaharui; (ii) A. 6 k. 7(2) diguna pakai dalam hal keadaan apabila serahan kediri writ admiralti *in rem* adalah satu yang mustahil; (iii) sama ada A. 6 k. 7(2) diniatkan untuk memansuhkan atau menafikan hak statutori terakru pemohon untuk mendakwa tindakan *in rem*nya dan sebagai jaminan untuk tindakannya; dan (iv) sama ada bahasa A. 6 k. 7(2) menghalang mahkamah daripada melaksanakan bidang kuasa sedia ada untuk melanjutkan kesahan writ admiralti *in rem* apabila mahkamah berpendapat bahawa keadilan kes berkehendakkannya.

Diputuskan (membenarkan rayuan dengan kos dalam kausa)
Oleh Nallini Pathmanathan HMP menyampaikan penghakiman mahkamah:

(1) Aturan 70 KKM adalah peruntukan utama bawah KKM berkaitan kausa dan hal perkara perkapalan. Writ admiralti *in rem* wajar dibezakan daripada writ sivil biasa. Apabila defendan mengelak serahan dan tidak boleh dikesan, A. 62 k. 5 KKM membenarkan writ diserahkan secara serahan ganti. Jika defendan tidak berada dalam bidang kuasa, A. 11 KKM membenarkan plaintif memohon penyerahan writ luar bidang kuasa untuk membawa defendan dalam rangkuman bidang kuasa mahkamah. Peruntukan-peruntukan ini, walau bagaimanapun, tidak terpakai pada writ admiralti *in rem*, yang bawah A. 70 KKM perlu diserahkan melalui satu cara sahaja, iaitu, secara kediri atas kapal defendan jika dan apabila defendan memasuki perairan Malaysia. Jika kapal tidak memasuki bidang kuasa, penyerahan writ tidak boleh dibuat.

(2) Tujuan dan niat A. 6 k. 7(2) KKM, untuk memastikan penyerahan segera writ kepada defendan, tidak memperuntukkan dan oleh itu, tidak terguna pakai pada, situasi-situasi di mana adalah mustahil untuk plaintif membuat serahan kediri writ admiralti *in rem*. Apabila kapal defendan tidak pernah memasuki bidang kuasa, had lima kali untuk jumlah pembaharuan writ admiralti tidak terpakai. Bacaan harmoni A. 6 k. 7(2) dan A. 70 KKM menjurus pada pendekatan yang konsisten dengan kedudukan undang-undang dalam bidang kuasa maritim utama lain, seperti Singapura, England, Hong Kong dan Australia. Oleh sebab writ admiralti *in rem* hanya boleh diserahkan atas kapal defendan dalam kawasan bidang kuasa mahkamah, diikuti bahawa mahkamah wajar membenarkan writ dibaharui selagi kapal defendan tidak memasuki bidang kuasa.

(3) Fimbank telah, dengan memulakan tuntutan *in rem*, memperoleh hak tindakan statutori *in rem* diteruskan terhadap kapal tersebut. Walaupun milikan kapal bertukar tiga kali semenjak pengeluaran writ, hak tindakan statutori *in rem* Fimbank berterusan. A. 6 k. 7(2) tidak boleh digunakan untuk menafikan hak ini. Itu juga tidak boleh digunakan

untuk mendalihkan tuntutan yang telah dibawa dalam tempoh masa ketiadaan asas dari segi fakta atau undang-undang untuk berbuat demikian. Fimbank tidak berdiam diri berkaitan dengan writ itu, dan tidak mengabaikan apa-apa langkah untuk membuat serahan. Hakikatnya, Fimbank telah mengawasi secara teliti pergerakan kapal sepanjang tempoh kesahan writ itu. Fimbank tidak boleh disalahkan atas ketidaksampaian kapal ke perairan Malaysia, menjadikan penyerahan writ tersebut mustahil. Seperti itu juga, pertukaran pemilikan kapal selepas pengeluaran writ adalah melangkaui kawalan Fimbank. Ketidakadilan jelas akan berlaku pada Fimbank jika hak statutorinya untuk mendakwa tuntutan *in rem*nya dan untuk memperoleh jaminan untuk tuntutannya didalihkan oleh alasan bacaan A. 6 k. 7(2) KKM yang terlalu teliti.

(4) Ketiadaan kelompongan dalam KKM tidak boleh dijadikan halangan untuk melaksanakan kuasa sedia ada mahkamah. Selanjutnya, alasan mahkamah-mahkamah bawahan bahawa terdapat kelompangan dalam KKM adalah cacat dan tidak tepat kerana kekurangan kelompangan sepatutnya menunjukkan adanya remedi-remedi alternatif untuk pihak yang terkilan. Tiada remedi alternatif sedemikian untuk Fimbank. Tafsiran yang diberi untuk A. 6 k. 7(2) oleh mahkamah-mahkamah bawahan tidak mengendahkan kesukaran praktikal yang dihadapi plaintif-plaintif apabila hendak menyerahkan writ *in rem* apabila kapal defendan tidak pernah memasuki bidang kuasa. Itu juga berpotensi memberi insentif pada pemilik-pemilik kapal untuk mengelak liabiliti dengan melabuhkan kapal di luar bidang kuasa sehingga tempoh had masa tuntutan itu tamat. Oleh itu, A. 6 k. 7(2) KKM tidak boleh ditafsir untuk mengenakan batasan mutlak atau had berapa kali writ admiralti *in rem* boleh dibaharui. Budi bicara terakhir untuk menentukan sama ada hendak membenarkan pembaharuan writ *in rem* atas kepentingan keadilan terletak pada mahkamah.

Obiter:

(1) Jawatankuasa Peraturan dalam tahun 2000 memperkenalkan pindaan pada A. 6 k. 7(2) Kaedah-kaedah Mahkamah Tinggi 1980 dengan mengehadkan jumlah writ boleh dibaharui pada dua kali untuk writ-writ biasa di Semenanjung Malaysia, tiga kali untuk writ-writ biasa di Sabah dan Sarawak dan lima kali untuk writ-writ admiralti. Peruntukan ini adalah *pari materia* dengan A. 6 k. 7(2) KKM. Jawatankuasa Peraturan sepatutnya mempertimbangkan untuk meminda A. 6 k. 7(2) KKM untuk membuang had lima kali untuk jumlah pembaharuan writ admiralti. Pindaan sedemikian sudah pasti akan menghalang terjadinya situasi-situasi seperti yang berbangkit dalam rayuan ini dan juga sejajar dengan undang-undang dalam bidang kuasa maritim besar yang lain.

Case(s) referred to:

Arab-Malaysian Credit Bhd v. Tan Seang Meng [1995] 1 CLJ 773 CA ***(refd)***
Aichhorn & Co KG v. The Ship "MV Talabot" (1974) 132 CLR 449 ***(refd)***
Deutz MWM Far East Pte Ltd v. The Owners Of & Other Persons Interested In The Ship Or Vessel "Hull No. 308"; Standard Chartered Bank (Interveners) [1991] 3 CLJ 2984; [1991] 4 CLJ (Rep) 495 ***(refd)***
Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal [2009] 4 CLJ 329 FC ***(refd)***
Ho Yoke Kwei & Anor v. Ong Eng Hin [1997] 1 CLJ 603 HC ***(refd)***
Minmetals South-East Asia Corporation Pte Ltd v. Nakhoda Logistics Sdn Bhd [2019] 3 CLJ 198 CA ***(refd)***
Pan United Shipyard Pte Ltd v. The Ship 'Rodolfo Mata' [2004] FCA 117 ***(refd)***
Permodalan MBF Sdn Bhd v. Tan Sri Dato' Seri Hamzah Abu Samah & Ors [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244 SC ***(refd)***
Re Aro Co Ltd [1980] 1 Ch 196 ***(refd)***
Societe Generale v. The Owners And/Or Demise Charterers Of And/Or Other Persons Interested In The Ship Or Vessel "MAPLE" [2018] 1 LNS 927 HC ***(refd)***
The Al Dhabiyyah [1999] 4 HKC 414 ***(refd)***
The Berny [1979] 1 QB 80 ***(refd)***
The Chong Beng [1997] 3 HKC 579 ***(refd)***
The Lircay [1997] 1 SLR (R) 699 ***(refd)***
The Monica S [1968] 2 WLR 431 ***(refd)***
Yomeishu Seizo Co Ltd & Ors v. Sinma Medical Products (M) Sdn Bhd [1996] 2 BLJ 142 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 6 rr. 7(1), (2), (2A), O. 11, O. 62 r. 5, O. 70 rr. 1(1), 3(3), 7(1), 10, O. 92 r. 4
Rules of the High Court 1980, O. 6 r. 7(2), O. 92 r. 4

Admiralty Rules 1988 [UK], r. 20
Civil Procedure Rules 1998 [UK], r. 61.3(5)
Rules of the High Court [HK], O. 6 r. 7(2)

[Editor's note: For the Court of Appeal judgment, please see Fimbank Plc v. Pemilik Dan/Atau Pencarter Demis Kapal Atau Vesel "Nika" Kini Dikenali Sebagai "Bao Lai" [2023] 7 CLJ 389 (overruled); For the High Court judgment, please see [2022] 8 CLJ 324 (overruled).]

For the appellant - Arun Krishnalingam, Aaron Siva & Loh Yan Shuang; M/s Christopher & Lee Ong

Reported by S Barathi

JUDGMENT

Nallini Pathmanathan FCJ:

Introduction

[1] The issue before the Federal Court concerns the number of times an admiralty writ *in rem* may be renewed. In this jurisdiction, the renewal of a writ is governed by O. 6 r. 7 of the Rules of Court 2012 ('the Rules'). More

particularly, O. 6 r. 7(2) of the Rules expressly provides that the validity of a writ in an admiralty action may be extended five times where efforts to serve the writ on a defendant have been unsuccessful.

[2] The instant appeal turns on whether the court may exercise its inherent powers to renew a writ *in rem* beyond the fifth time to prevent injustice to a plaintiff where the service of the writ is an impossibility. Both the courts below were of the view that they could not override the express terms of O. 6. r 7(2) of the Rules to renew a writ *in rem* for the sixth time even in a situation where the writ could not be served through no fault of the plaintiff.

[3] We reversed the decisions of the courts below and now provide our reasons for doing so.

Background Facts

[4] The appellant, Fimbank PLC ('Fimbank') is a Maltese bank and a trade financier. Fimbank had financed the purchase of a cargo of approximately 17,300 MT of Ukrainian Milling Wheat ('the cargo') by its borrower-customers. In exchange, Fimbank obtained the original bills of lading to the cargo as security for the financing extended. The cargo was shipped on board the vessel "NIKA" ('the vessel') for carriage from Chornomorsk, Ukraine to an Egyptian Mediterranean Port. At the material time, the vessel was owned by the respondent ('the vessel owners').

[5] On 17 May 2019, Fimbank filed an admiralty writ *in rem* in the High Court at Kuala Lumpur ('the writ') against the vessel owners on the grounds that the vessel owners misdelivered the cargo to unauthorised third parties without presentation of the original bills of lading, thereby causing loss to Fimbank. It is noted that this cause of action is well established in this jurisdiction (see: *Minmetals South-East Asia Corporation Pte Ltd v. Nakhoda Logistics Sdn Bhd* [2019] 3 CLJ 198; [2018] 6 MLJ 152).

[6] The following principles govern the service of the writ:

(i) the writ is to be served on the vessel itself as stipulated under O. 70 r. 7(1) of the Rules:

> … a writ by which an action *in rem* is begun shall be served on the property against which the action is brought …

(ii) the manner in which the service of the writ is to be physically effected against the vessel is prescribed by O. 70 r. 10 of the Rules. Substituted service of the writ is not permitted;

(iii) the writ also cannot be served out of the jurisdiction. This is stated under O. 70 r. 3(3) of the Rules:

Service out of jurisdiction of notice of writ (O. 70 r. 3)

(1) Subject to the following provisions of this rule, service out of the jurisdiction of a notice of a writ, containing any [admiralty] claim … is permissible with the leave of the Court …

…

(3) **Paragraph (1) shall not apply to an action *in rem*.**

(emphasis added)

(iv) it follows that the writ can only be served on the vessel if the vessel comes into Malaysian waters. The rationale for this rule was explained by the High Court of Australia in *Aichhorn & Co KG v. The Ship "MV Talabot"* (1974) 132 CLR 449:

> Since the jurisdiction of the court to entertain an action *in rem* is based on the presence of the *res* within the territory of the state under whose authority the court sits, and since the purpose of such an action is to enable the judgment to be satisfied out of the *res*, it must follow … that a writ in an action *in rem* can only be served if the *res* is within the jurisdiction.

(v) the writ is valid in the first instance for six months from the date of its issue as provided under O. 6 r. 7(1) of the Rules:

> For the purpose of service, a writ … is valid in the first instance for six months beginning from the date of its issue …

[7] The cumulative effect of the above provisions is that the writ, which was filed by Fimbank on 17 May 2019, was required to be physically served on the vessel within Malaysian waters on or before 16 November 2019. However, Fimbank was unable to do so as the vessel had not entered Malaysian waters since the writ was issued.

[8] Therefore, Fimbank applied to the court to extend the validity of the writ pursuant to the following provisions:

(i) Order 6 r. 7(2) of the Rules states that where a plaintiff has been unsuccessful in its efforts to serve an admiralty writ, the court may extend the validity of the admiralty writ five times for a period not exceeding six months at any one time:

> Subject to paragraph (2A), **where efforts to serve a writ on a defendant have been unsuccessful, the Court may by order extend the validity of the writ** twice (in Sabah and Sarawak thrice and in **admiralty actions five times), not exceeding six months at any one time,** beginning with the day next following that on which it would otherwise expire, as may be specified in the order.
>
> (emphasis added)

(ii) Order 6 r. 7(2A) of the Rules sets out the procedure to be followed when making an application to renew the writ:

> An application for a renewal of writ must be made before the expiry of the writ, *ex parte* by notice of application supported by affidavit showing that efforts have been made to serve the defendant within one month from the date of the issue of the writ and that efforts have been made subsequent thereto to effect service.

[9] Between 15 November 2019 and 10 November 2021, Fimbank made a total of five applications to renew the writ on the grounds that the vessel had not been in Malaysian waters for service of the writ to be effected. The High Court allowed all five applications and accordingly extended the validity of the writ five times consecutively for a period of six months each time. The fifth extension granted by the High Court had extended the validity of the writ until 16 May 2022.

The High Court

[10] On 13 April 2022, Fimbank filed an application to extend the validity of the writ for the sixth time premised on the reason that the writ remained unserved due to the vessel not having entered Malaysian waters since the issuance of the writ. This assertion was made based on Fimbank's consistent monitoring of the movements of the vessel through the use of services provided by Lloyd's List Intelligence and Marine Traffic. Fimbank accordingly argued that it had not had any reasonable opportunity to effect service of the writ and that its inability to serve the writ was not due to any default or lack of effort on its part.

[11] Fimbank further highlighted that the ownership of the vessel had changed three times since the cause of action arose. At that time, the vessel was owned by Discover Investment Corp ('Discover'). However, following the issuance of the writ, the ownership of the vessel had been transferred three times: first, from Discover to Anchor Nautical SA ('Anchor'); second, from Anchor to Bluefish Marine Corp ('Bluefish'); and third, from Bluefish to Bao Yi Shipping Co Ltd ('Bao Yi'), who is the current owner of the vessel.

[12] As a result of these changes in ownership of the vessel, Fimbank argued that it could not now issue a fresh writ *in rem* for the same claim. This was because Fimbank's claim *in rem* falls under a category of maritime claims known as a statutory right of action *in rem* or 'statutory lien'. Such a claim requires Fimbank to establish liability *in personam* on the part of the owner of the defendant vessel at the time the writ *in rem* is issued. However, the present owner of the vessel, Bao Yi, is not the party liable for Fimbank's claim *in personam*. In other words, the change in ownership of the vessel had the effect of defeating any fresh claim *in rem* brought by Fimbank against the vessel owners. In any event, the limitation period for Fimbank's claim had expired.

[13] Fimbank thus argued that its substantive rights against the vessel owners were now vested in and contingent on the writ as issued on 17 May 2019 and that if the writ was not renewed, it would be deprived of its substantive rights through no fault of its own, amounting to manifest injustice.

[14] Premised on the above, Fimbank urged the High Court to use its inherent powers under O. 92 r. 4 of the Rules to renew the writ beyond the fifth time. Order 92 r. 4 of the Rules reads as follows:

> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[15] Fimbank's arguments did not find favour with the High Court. On 12 May 2022, the High Court dismissed Fimbank's application to extend the validity of the writ for the sixth time holding, amongst others, as follows:

(i) the inherent powers of the court should only be exercised where there is a *lacuna* in the Rules. There is no *lacuna* in this case as O. 6 r. 7(2) of the Rules prescribes the maximum number of times an admiralty writ *in rem* can be renewed;

(ii) the court cannot usurp the powers and functions of the Rules Committee, which had recognised the need to fix a limit on the number of times a writ in an admiralty action could be renewed; and

(iii) if the court were to allow the writ to be renewed for the sixth time, there would be uncertainty in the event that the writ is still not served within the next six months for the same reasons.

The Court Of Appeal

[16] Dissatisfied with the decision of the High Court, Fimbank appealed to the Court of Appeal. On 15 November 2022, the Court of Appeal dismissed the appeal and affirmed the findings of the High Court on the following grounds:

(i) the court is not permitted to override the five time limit prescribed by O. 6 r. 7(2) of the Rules for the renewal of a writ in an admiralty action;

(ii) since there is no *lacuna* in the Rules in relation to the number of times an admiralty writ can be renewed, the court cannot invoke its inherent powers pursuant to O. 92 r. 4 of the Rules; and

(iii) if the court were to continue granting extensions of the writ until the vessel comes into Malaysian waters, the purpose of O. 6 r. 7(2) of the Rules would be defeated.

A **The Federal Court**

[17] On 31 March 2023, Fimbank was granted leave to appeal to the Federal Court on the following questions of law:

(i) whether O. 6 r. 7(2) of the Rules places an absolute cap and/or limit upon the number of times an admiralty writ *in rem* may be extended and/or renewed;

(ii) whether O. 6 r. 7(2) of the Rules applies in circumstances where personal service of an admiralty writ *in rem* is an impossibility;

(iii) whether O. 6 r. 7(2) of the Rules is intended to abrogate or defeat a claimant's accrued statutory rights to prosecute its claim *in rem* and to security for its claim; and

(iv) whether the language of O. 6 r. 7(2) of the Rules precludes the court from exercising its inherent jurisdiction to extend the validity of an admiralty writ *in rem* when the court is of the view that the justice of the case requires it.

The Purpose And Object Of O. 6 r. 7(2) Of The Rules

[18] The primary issue that arises for consideration in this appeal is the construction of O. 6 r. 7(2) of the Rules. In this context, it is necessary to examine the purpose and object of O. 6 r. 7(2) of the Rules.

[19] In the Federal Court case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329; [2009] 4 MLJ 149, Zaki Azmi CJ made the following observations on the purpose and object of O. 6 r. 7(2A) of the Rules of the High Court 1980, which is in *pari materia* with O. 6 r. 7(2A) of the Rules:

> [39] I strongly believe that *O. 6 r. 7(2A) of the RHC was introduced to prevent abuse by the plaintiffs in filing writs and sleeping on them without making efforts to serve them. This practice of inactivity is something which courts loathe. It is against the administration of justice. It creates a backlog and results in a false number of pending cases. In my opinion, courts should take serious a (sic) view of such cases. If not, they will continue to remain in the list of outstanding cases. As such, O. 6 r. 7(2A) of the RHC must be strictly enforced as required by the rule.*
>
> [40] When the plaintiffs apply to extend the validity of writs, courts should examine closely the affidavits filed in support of applications for extensions. Before granting an extension, courts must be satisfied that serious efforts had been made to serve. A simple and plain statement that efforts had been made to serve cannot be a sufficient ground. The affidavits must provide detailed facts as to when, where and how attempts to serve were made. Otherwise O 6 r 7(2A) of the RHC will become a dead letter. The object of the rule will be defeated. (emphasis added)

[20] It is therefore clear that the purpose and object of O. 6 r. 7(2) of the Rules is to stop a plaintiff from sleeping on a writ without making any efforts to serve the same. It is in such a circumstance that the cap on the number of renewals of an admiralty writ under O. 6 r. 7(2) of the Rules is intended to operate.

[21] Order 70 of the Rules is the primary provision under the Rules that governs admiralty causes and matters. Order 70 r. 1(1) of the Rules reads as follows:

> **Application and interpretation (O. 70 r. 1)**
>
> (1)This Order applies to Admiralty causes and matters, and **the other provisions of these Rules apply to those causes and matters subject to the provisions of this Order.** (emphasis added)

[22] In other words, in the event that there is a conflict between O. 70 of the Rules and other provisions of the Rules in respect of an admiralty cause or matter, O. 70 of the Rules would prevail.

[23] As stated earlier, O. 70 of the Rules envisages that an admiralty writ *in rem* can only be served on the defendant vessel when it is within Malaysian territorial waters. If the vessel does not enter the jurisdiction, the service of the writ simply cannot be effected. In such a circumstance, O. 6 r. 7(2) of the Rules cannot be logically read to impose a five-time renewal limit for the writ.

[24] Crucially, O. 6 r. 7(2) of the Rules contains a proviso that "efforts to serve a writ on a defendant have been unsuccessful". Order 6 r. 7(2A) of the Rules further mandates that "efforts have been made to serve the defendant within one month from the date of the issue of the writ and that efforts have been made subsequent thereto to effect service". However, if the defendant vessel never enters Malaysian waters, there is no opportunity for the plaintiff to make "efforts" to serve its writ *in rem*.

[25] The rationale of O. 6 r. 7(2) of the Rules in the context of admiralty claims is to guard against indolent litigants who fail to take serious steps to serve a writ *in rem* on a defendant vessel that is within the jurisdiction. Therefore, on a purposive reading of O. 6 r. 7(2) of the Rules, the court may refuse to extend the validity of a writ *in rem* where no serious attempt was made by the plaintiff to serve the writ after the defendant vessel comes into Malaysian territorial waters. This same reasoning was adopted in *Societe Generale v. The Owners And/Or Demise Charterers Of And/Or Other Persons Interested In The Ship Or Vessel "MAPLE"* [2018] 1 LNS 927, where the failure of a plaintiff to effect service of an admiralty writ *in rem* on a vessel when it did in fact enter Malaysian waters was found by the High Court to militate against the exercise of the court's discretion under O. 6 r. 7(2) of the Rules to extend the validity of the writ.

[26] An admiralty writ *in rem* ought to be contrasted from an ordinary civil writ. The two-time limit placed by O. 6 r. 7(2) of the Rules on the renewal of an ordinary writ is complemented by other provisions of the Rules that cater for situations where a plaintiff encounters difficulties in effecting service of the writ. Where a defendant is evading service or cannot be traced, O. 62 r. 5 of the Rules allows the writ to be served by way of substituted service. If the defendant is not within the jurisdiction, O. 11 of the Rules permits the plaintiff to apply for service of the writ out of the jurisdiction in order to bring the defendant within the court's jurisdiction. These provisions, however, do not apply to an admiralty writ *in rem*, which is required under O. 70 of the Rules to be served through that single means, that is, personally on the defendant vessel if and when it enters Malaysian waters.

[27] Ultimately, the purpose and object of O. 6 r. 7(2) of the Rules is to ensure the prompt service of a writ on a defendant. Order 6 r. 7(2) of the Rules does not cater for, and is therefore inapplicable to, situations where it is impossible for a plaintiff to effect personal service of an admiralty writ *in rem*. Where the defendant vessel never comes into the jurisdiction, the five-time limit on the number of renewals of an admiralty writ simply does not apply. This is the proper interpretation to be accorded to O. 6 r. 7(2) of the Rules.

The Position In Other Jurisdictions

[28] The above reading of O. 6 r. 7(2) of the Rules is in line with the laws of other leading maritime jurisdictions, such as Singapore, England, Hong Kong and Australia, where there is no cap or limit on the number of times the validity of an admiralty writ *in rem* can be extended.

[29] In Singapore, although O. 6 r. 3 of the recently amended Rules of Court 2021 has introduced a limit on the number of times an ordinary writ can be renewed, the said limit is expressly precluded from applying to admiralty writs. The relevant provision is reproduced below:

> **Duration and renewal of originating claim or originating application (O. 6, r. 3)**
>
> (1) Subject to this Rule, an originating claim or an originating application is valid for service for 3 months beginning with the date of its issue.
>
> …
>
> (4) Except in a special case, the Court may extend the validity of the originating claim or originating application only twice and by not more than 3 months each time.
>
> …
>
> (6) **Paragraphs (1) and (4) do not apply to an originating claim relating to Admiralty causes and matters.** (emphasis added)

[30] Admiralty writs are thus treated differently from ordinary civil writs, as they ought to be, because the service of an admiralty writ is dependent on when and whether the defendant vessel is within the jurisdiction.

[31] Similarly, the procedural rules in England, Australia and Hong Kong do not impose any limit or cap on the number of times an admiralty writ can be renewed (see: r. 61.3(5) of the Civil Procedure Rules 1998 (UK); r. 20 of the Admiralty Rules 1988 (AU); O. 6 r. 8(2) of the Rules of the High Court (HK)).

[32] Furthermore, the courts across these jurisdictions recognise that the absence of the defendant vessel from the jurisdiction amounts to a good reason to allow the renewal of an admiralty writ *in rem* (see: *The Lircay* [1997] 1 SLR (R) 699; *The Berny* [1979] 1 QB 80; *The Chong Beng* [1997] 3 HKC 579)). The practice of the courts in these jurisdictions is to regularly renew writs *in rem* until the defendant vessel calls into a port within the jurisdiction, thereby affording the plaintiff a reasonable opportunity to serve the writ.

[33] In *Pan United Shipyard Pte Ltd v. The Ship 'Rodolfo Mata'* [2004] FCA 117, the Federal Court of Australia emphasised that the court has a discretion to repeatedly renew a writ *in rem* where the defendant vessel has not entered the jurisdiction for service to be effected:

> [10] … the Court has power to extend the time within which a writ *in rem* may be served by granting leave to serve the writ beyond a period of twelve months. Such leave may be in respect of a specific occasion or may be granted in general terms. It would seem to follow that *the power to grant leave would not be exhausted upon the use of the power and further leave may be granted if circumstances warrant the exercise of that discretion.*
>
> …
>
> *[12] If the plaintiff shows that it has taken reasonable steps to be informed of the whereabouts of the ship the subject of the writ, and it appears that the ship has not entered Australia,* or has not been present in Australia for a sufficient period to provide the plaintiff with a reasonable opportunity to effect service on the vessel, then leave to serve beyond the effective term of the writ may be granted. (emphasis added)

[34] The court of first instance in Hong Kong made similar observations in *The Al Dhabiyyah* [1999] 4 HKC 414:

> The essence and purpose of admiralty jurisdiction *in rem* is the obtaining of security by the plaintiff … It is the statutory right of the plaintiff in action *in rem* to obtain security and he has the option … to choose the security he wishes to obtain and the timing of obtaining of such security, so long as it is within the period of the validity of the writ or its extended valid period if the writ is allowed to be renewed. *If no vessel comes in at all,*

A *he will normally also be granted a renewal of the writ to enable him to obtain security during the extended period of the writ. It is not unknown for a writ to be renewed many times due to the inability of the plaintiff to obtain security and therefore serve the writ in rem.* (emphasis added)

[35] A harmonious reading of O. 6 r. 7(2) and O. 70 of the Rules gives rise B to an approach that is consistent with the position of law in other like jurisdictions. Since an admiralty writ *in rem* can only be served on the defendant vessel within the territorial jurisdiction of the court, it necessarily follows that the court ought to allow the writ to be renewed for as long as the defendant vessel does not enter the jurisdiction.

C **Fimbank's Statutory Right Of Action *In Rem***

[36] As mentioned earlier, Fimbank has, through the commencement of its claim *in rem*, acquired a statutory right of action *in rem* to proceed against the vessel. A statutory right of action *in rem* crystallises upon the issuance of a writ, conferring upon the plaintiff the status of a secured creditor (see: D *Re Aro Co Ltd* [1980] 1 Ch 196; *Deutz MWM Far East Pte Ltd v. The Owners Of & Other Persons Interested In The Ship Or Vessel "Hull No. 308"; Standard Chartered Bank (Interveners)* [1991] 3 CLJ 2984; [1991] 4 CLJ (Rep) 495; [1991] 3 MLJ 393). This right cannot be defeated by a subsequent change in ownership of the *res*, even if the writ has not been served (see: *The Monica* E *S* [1968] 2 WLR 431).

[37] In the present appeal, although the ownership of the vessel has changed three times since the issuance of the writ, Fimbank's statutory right of action *in rem* persists. Order 6 r. 7(2) of the Rules cannot be utilised to defeat this right. Nor can it be used to deny a claim that has been brought F within time where there is no factual or legal basis to do so as is the case here. Order 6 r. 7(2) of the Rules, being subsidiary legislation, cannot eradicate or annihilate a statutory right of action *in rem* that has accrued within the limitation period.

G **[38]** A plain or grammatical reading of O. 6 r. 7(2) of the Rules, where the words in O. 6 r. 7(2) of the Rules are taken *in vacuo* without consideration of the rest of the provisions in the Rules, would result in a construction that there is an absolute limit of five renewals of the writ that can be sought by Fimbank. However, such an interpretation would defeat Fimbank's statutory right of action *in rem* and effectively override its status as a secured creditor, H resulting in manifest injustice to Fimbank. This could not have been the intention behind O. 6 r. 7(2) of the Rules.

[39] Fimbank has not slept on the writ, nor has it forsaken any step to effect service of the same. In fact, it has diligently monitored the movements of the vessel throughout the period of validity of the writ. Fimbank cannot be I faulted for the non-arrival of the vessel into Malaysian waters, rendering service of the writ an impossibility. The changes in ownership of the vessel after the writ's issuance are similarly beyond Fimbank's control.

[40] The purpose of the Rules is to facilitate the administration of justice; not to incapacitate it. To read O. 6 r. 7(2) of the Rules in a manner which places an absolute cap or limit on the number of times a writ *in rem* may be renewed, as the courts below have done, diverges from the purpose of the Rules and punishes a diligent litigant. Manifest injustice would result to Fimbank in the event that its statutory right to prosecute its claim *in rem* and to obtain security for its claim are defeated by reason of a pedantic reading of O. 6 r. 7(2) of the Rules. This is a situation that warrants the invocation of the court's inherent powers to prevent injustice.

The Inherent Powers Of The Court

[41] The courts below held that the inherent powers of the court pursuant to O. 92 r. 4 of the Rules should only be invoked where there is a *lacuna* in the Rules. In arriving at this conclusion, the High Court below relied on *Yomeishu Seizo Co Ltd & Ors v. Sinma Medical Products (M) Sdn Bhd* [1996] 2 BLJ 142; [1996] 2 MLJ 334 ('*Yomeishu Seizo*'), which posited as follows:

> … where there is a *lacuna* in the rules and practice, then and only then, may the aforesaid inherent jurisdiction be invoked.

[42] The foregoing proposition, however, cannot be read so as to confine the exercise of the court's inherent powers only to situations where there is a *lacuna* in the Rules. The absence of a *lacuna* in the Rules cannot of itself fetter the exercise of the court's inherent powers. In *Ho Yoke Kwei & Anor v. Ong Eng Hin* [1997] 1 CLJ 603; [1997] 4 MLJ 292, Augustine Paul JC (as he then was) observed that:

> … the inherent power of the court is not confined to merely filling in gaps in the rules but extends to mould remedies where no provision is made for them in the rules.

[43] In a similar vein, the then Supreme Court in *Permodalan MBF Sdn Bhd v. Tan Sri Dato' Seri Hamzah Abu Samah & Ors* [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244; [1988] 1 MLJ 178 held as follows:

> We read (O. 92 r. 4 of the Rules of the High Court 1980) this to mean that the rules cannot interfere with the exercise of the inherent powers by the court so long as it deems it necessary to prevent any injustice or any abuse of its own process. It follows that **where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers.** (emphasis added)

[44] The court will therefore decline to resort to its inherent powers where there are other remedies provided for in the Rules. To this end, the reasoning of the courts below that there was no *lacuna* in the Rules was, with respect, flawed and incorrect because the lack of a *lacuna* necessarily indicates the availability of alternative remedies to an aggrieved litigant. No such alternative remedy was available to Fimbank in this case.

[45] The case of *Arab-Malaysian Credit Bhd v. Tan Seang Meng* [1995] 1 CLJ 773; [1995] 1 MLJ 525 ('*Arab-Malaysian Credit*') was an instance where the Court of Appeal exercised its inherent powers to extend the validity of writs beyond what was expressly stipulated in the Rules. In this case, the plaintiff had served the writ on the defendant by way of substituted service. Subsequently, a default judgment was entered against the defendant. However, the defendant managed to set aside the judgment on the basis that the order for substituted service was fatally flawed. The plaintiff was consequently required to re-serve the writ on the defendant. This placed the plaintiff in a conundrum as, by the time the default judgment was set aside, the writ had long expired and could no longer be validly served. At that time, O. 6 r. 7(2) of the Rules of the High Court 1980 provided as follows:

> Where a writ has not been served on a defendant, the Court may by order extend the validity of the writ from time to time for such period, **not exceeding 12 months at any one time,** beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow. (emphasis added)

[46] Under O. 6 r. 7(2) of the Rules of the High Court 1980, the plaintiff could not obtain more than one order at a time for the renewal of a writ for a 12-month period. In order to overcome this conundrum, the plaintiff simultaneously applied for and obtained eight separate 12-month extensions of the validity period of the writ. The defendant was successful in its application before the High Court to set aside the eight extensions. The plaintiff appealed.

[47] In allowing the appeal, the Court of Appeal held that, notwithstanding O. 6 r. 7(2) of the Rules of the High Court 1980, the court "had ample jurisdiction" to grant the eight extensions sought by the plaintiff. The Court of Appeal reasoned that it could overcome the restriction of granting more than one extension of 12 months at any given time as expressed in O. 6 r. 7(2) of the Rules of the High Court 1980 by having resort to O. 92 r. 4 of the Rules of the High Court 1980, which reserved the inherent powers of the court to make any order as may be necessary to prevent injustice.

[48] The High Court below declined to follow *Arab-Malaysian Credit* on the grounds that the decision was premised on the old O. 6 r. 7(2) of the Rules of the High Court 1980, which did not contain a cap on the number of times a writ could be renewed. In taking that approach, the High Court, with respect, did not appreciate the essence of the decision in *Arab-Malaysian Credit* which recognised that the recourse to the inherent powers of the court under O. 92 r. 4 of the Rules is a matter of judicial discretion.

[49] We note that the Rules Committee in 2000 introduced an amendment to O. 6 r. 7(2) of the Rules of the High Court 1980 by limiting the number of times a writ can be renewed to twice for ordinary writs in Peninsular Malaysia, thrice for ordinary writs in Sabah and Sarawak and five times for admiralty writs. This provision is in *pari materia* with O. 6 r. 7(2) of the Rules. Nonetheless, in our view, the 2000 amendment does not preclude the court from exercising its inherent powers to extend the validity of an admiralty writ *in rem* beyond the fifth time to prevent injustice to a litigant. The courts below, with respect, erred in holding that they did not have the power to renew a writ *in rem* for the sixth time, notwithstanding the injustice that will result to Fimbank, by sole reason of the express wording of O. 6 r. 7(2) of the Rules.

[50] The construction accorded to O. 6 r. 7(2) of the Rules by the courts below ignores the practical difficulties faced by plaintiffs in effecting service of a writ *in rem* where the defendant vessel never comes into the jurisdiction. It also potentially incentivises owners of a vessel to evade liability by keeping their vessel out of the jurisdiction until the limitation period for the claim expires. Therefore, O. 6 r. 7(2) of the Rules cannot be construed so as to impose an absolute cap or limit on the number of times an admiralty writ *in rem* can be renewed. The ultimate discretion to decide whether to allow the renewal of a writ *in rem* in the interests of justice rests with the court.

[51] In our respectful view, the Rules Committee ought to consider amending O. 6 r. 7(2) of the Rules to remove the five-time limit on the number of renewals of an admiralty writ. Such an amendment would inevitably prevent unjust situations such as the one that arose in the instant appeal and also be in keeping with the laws of other major maritime jurisdictions.

Additional Orders Sought By Fimbank

[52] In addition to the four questions of law posed for our determination as set out in para. 17 of this judgment, Fimbank also sought the following orders from this court in the course of the hearing of the instant appeal:

(i) that the identities of the parties and the vessel, including the name and International Maritime Organisation ('IMO') number of the vessel, be anonymised in any judgment to be issued by this court; and

(ii) that the key facts of the instant appeal, such as port names, cargo type and quantity, bill of lading numbers and dates, be anonymised or stated generically to the extent possible.

[53] In seeking the above orders, learned counsel for Fimbank submitted on the following grounds:

(i) the conduct of the vessel owners strongly indicates that they will deliberately keep the vessel out of Malaysian waters should they come to learn that there is an extant writ against the vessel. Following the issuance of the writ, the vessel owners sold the vessel under highly suspicious circumstances with the likely intent of evading liability.

(ii) the fact that the judgments of both the courts below were published without any redactions does not render the redactions sought by Fimbank in the instant appeal futile or otiose. There is a possibility that the vessel owners are unaware of the existence of these judgments. Even if they are aware of the same, their knowledge would be limited to the fact that the courts below declined to renew the writ;

(iii) a judgment of the Federal Court will inevitably attract a wide readership, making it all the more necessary that the redactions sought are granted; and

(iv) the claim underlying the instant appeal is the subject matter of an arbitration seated in London, England. The claim herein was commenced by Fimbank for the purpose of obtaining security for any award made in the arbitral proceedings. As such, the redactions sought are necessary to protect arbitral confidentiality.

[54] Having considered the above submissions, we are of the view that there are no compelling circumstances to grant the orders sought by Fimbank. The allegations raised against the vessel owners in the instant appeal are true of every vessel owner. The facts of this appeal are not extraordinary and do not warrant the granting of the redactions sought. Moreover, the instant appeal is distinct and separate from any arbitral proceedings between the parties and therefore has no bearing on arbitral confidentiality. In the circumstances, we do not think it is necessary to grant the orders sought by Fimbank.

The Questions Of Law

[55] For the reasons we have enunciated at length above, we answer the questions of law as follows:

(i) Question 1:

Whether O. 6 r. 7(2) of the Rules places an absolute cap and/or limit upon the number of times an admiralty writ *in rem* may be extended and/or renewed.

Answer:

No, O. 6 r. 7(2) of the Rules does not;

(ii) Question 2:

Whether O. 6 r. 7(2) of the Rules applies in circumstances where personal service of an admiralty writ *in rem* is an impossibility.

Answer:

No, O. 6 r. 7(2) of the Rules does not apply in such circumstances;

(iii) Question 3:

Whether O. 6 r. 7(2) of the Rules is intended to abrogate or defeat a claimant's accrued statutory rights to prosecute its claim *in rem* and to security for its claim.

Answer:

No, that is not the intention of O. 6 r. 7(2) of the Rules; and

(iv) Question 4:

Whether the language of O. 6 r. 7(2) of the Rules precludes the court from exercising its inherent jurisdiction to extend the validity of an admiralty writ *in rem* when the court is of the view that the justice of the case requires it.

Answer:

No, the language of O. 6 r. 7(2) of the Rules does not preclude the inherent jurisdiction (or more accurately, the inherent powers) of the court to extend the validity of an admiralty writ *in rem* in order to prevent injustice.

[56] Following from the above, we unanimously allowed Fimbank's appeal with costs in the cause.